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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

File: WAC 99 110 51884

Office: CALIFORNIA SERVICE CENTER

Date: 4 MAR 2002

IN RE: Petitioner:  
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act,  
8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

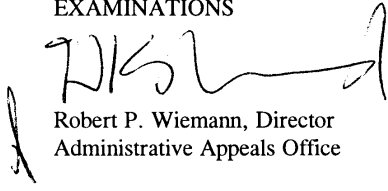
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an importer and wholesaler of diamonds. The petitioner seeks to continue the employment of the beneficiary temporarily in the United States as its marketing manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The director also determined that the petitioner had not established a qualifying relationship between itself and the foreign entity in this case.

On appeal, counsel for the petitioner asserts that the director's decision is arbitrary and capricious and did not take into account the great weight of documentary evidence. Counsel also asserts that as the beneficiary had previously been granted L-1 classification, all elements for the continuation of the classification had been established.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The petitioner is a California corporation, incorporated in 1996. The petitioner employed at least three individuals at the time the extension petition was filed in March of 1999. The petitioner seeks to continue the employment of the beneficiary in the capacity of marketing manager and requests an L-1 classification for the beneficiary for the time period of March 1999 to March of

2002.

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petition requesting L-1 classification for the beneficiary indicated that the beneficiary duties included:

to control expansion in the U.S. market. Establish guidelines and procedures in distribution of product line [sic]. Contacts customer base and introduces new or special products within the marketplace. Examines market forces which may contribute to overall company growth.

The director requested additional evidence on this issue including the petitioner's organizational chart, California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Reports for all employees from 1996 to present, copies of the petitioner's payroll summary, Internal Revenue Service (IRS) Forms W-2 and W-3 evidencing wages paid to employees, a list of all employees from the date of establishment to the present, including non-immigrant status of each employee and a description of the beneficiary's duties detailing the specific nature of the alien's prospective duties in the U.S.

In response to the director's request for evidence, the petitioner provided the following on this issue:

A list of five employees that showed position titles of president, vice president/secretary, marketing manager, sales manager and receptionist,

An EDD Annual Reconciliation Statement dated January 1999 indicating wages paid in the 1998 calendar year in the amount of \$64,000,

An EDD Quarterly Wage and Withholding Report for the quarters ending December 31, 1998 and March 31, 1999 indicating payment of wages to the president of the organization, the vice-president/secretary and the marketing manager.

A resume for the beneficiary stating that:

[The beneficiary] was transferred to United states [sic] in April of 1998 as a Marketing Manager of the U.S. subsidiary. For the parent company to remain competitive, it was very necessary to have representatives in countries with larger markets, like the United States. It is essential for an US [sic] representative to maintain control of orders and organization. [The beneficiary], with his strong managerial abilities and experience in the diamond business, was the appropriate person for the position. [The beneficiary] has good marketing and communication skills, which are very essential to the company's business. In addition, he is very capable of managing Information

Technology requirements of the company. These were the main factors to appoint him as marketing manager of the subsidiary in the United States.

The director determined that the petitioner had not provided evidence the beneficiary had exercised or would exercise significant authority over generalized policy or that the beneficiary's duties had been or would be primarily managerial or executive in nature.

On appeal, counsel for the petitioner asserts that the beneficiary has always acted in a managerial capacity. Counsel states:

[The beneficiary] is the Marketing Manager overseeing the expansion of the U.S. market for wholesale diamonds. Moreover, [the beneficiary] is responsible for establishing procedures regarding future growth of the industry and to establish procedures to comply with those trends. He exercises discretion over the day to day activities of the businesses operation's including but not limited to formulating administrative and operational policies and procedures, reviewing and analyzing marketing and operational reports.

At no point, are any of his duties the duties of a first-line supervisor. Only management personnel, such as [the beneficiary], would have duties and responsibilities of recommending capital policies of company activities, and enforcing compliance with administrative policies and governmental regulations.

Counsel further asserts that it is contradictory for the Service to approve and grant a visa in which managerial capacity is a requirement and then deny an extension of the visa on the grounds that the individual does not have the same capacity in which he was approved.

Counsel's assertions are not persuasive. The petitioner's description of the job duties is insufficient to warrant a finding that the beneficiary has been or will be acting in a managerial or executive capacity. The description of job duties is vague and general in nature. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his position. The information that the beneficiary contacts customers and maintains control of orders, though more concrete than controlling expansion in the U.S. market, is also more indicative of providing services for the petitioner. As found in case law an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, counsel's statement of the beneficiary's duties does not constitute evidence and is not supported by documentary evidence. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the record as presently constituted indicates that the petitioner pays three individuals all with executive position titles. Based on a review of the record no supporting documentation is provided to show that the petitioner compensates a sales representative and receptionist. The record is not persuasive in demonstrating that the beneficiary's duties include managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title.

Finally, an extension petition is reviewed on its own merits. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988). In the case at hand, the director specifically requested further evidence on the issue of the beneficiary's duties. The information provided in response to the request was insufficient to establish that the beneficiary would be acting in a managerial or executive capacity.

The second issue in this proceeding is whether the petitioner and the foreign entity are qualifying organizations.

8 C.F.R. 214.2(l)(1)(ii)(G) states:

*Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in

the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(l)(1)(ii)(I) states:

*Parent* means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(l)(1)(ii)(J) states:

*Branch* means an operation division or office of the same organization housed in a different location.

8 C.F.R. 214.2(l)(1)(ii)(K) states:

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

*Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner provided no documentation to establish the qualifying relationship between itself and its parent company, apparently relying on the previous L-1 approval for the beneficiary. However, the director specifically requested further information on this issue in her request for additional evidence. The director specifically requested all stock certificates and percentages of ownership for both the foreign entity and petitioner. The director further requested evidence that the parent company had in fact paid for the ownership of the petitioner.

In response to the request for evidence, the petitioner provided a copy of a stock certificate issued by the petitioner to the apparent foreign entity, [REDACTED]. The petitioner also provided the minutes of a meeting, of an unknown company on an unknown date, wherein 1000 shares of a closely held corporation were issued to Aakash Exports.

The director determined that the petitioner had not established a qualifying relationship with a foreign entity. The director based her determination on the failure of the petitioner to provide monetary proof of the claimed subsidiary or affiliate relationship between the petitioner and the foreign entity. The director specifically noted in her decision that the bank statements of 1998 and 1999 provided by the petitioner were insufficient to establish that the foreign entity had paid for shares of the petitioner that was established in 1996.

On appeal, counsel for the petitioner asserts that the stock certificate provided by the petitioner clearly demonstrates that the petitioner is owned by [REDACTED]. Counsel also provides on appeal, two letters from two different companies. Both letters indicate that each company had been instructed to transfer funds owed to [REDACTED] to the petitioner. The transferred amount is not stated. Counsel also provides a statement from an individual indicating that this individual sent \$100,000 of money owed to [REDACTED] to the petitioner as per instructions from [REDACTED] to acquire the petitioner. The statement indicates that the value date of the transfer was July of 1997.

The stock certificate alone is not sufficient to establish that [REDACTED] is the sole owner of the petitioner. A stock certificate is merely written evidence that a named person is owner of a designated number of shares of stock in a corporation. Black's Law Dictionary (Fifth Edition, West Publishing Company, 1979). The director may request such other evidence as the director may deem necessary. 8 C.F.R. 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the Service may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

The minutes provided by the petitioner likewise are insufficient to show ownership of the petitioner. The minutes are for a meeting relating to the issuance of stock but are undated and do not specifically refer to the petitioner as the issuer of stock. Further, the two statements by representatives of unrelated companies and of an individual are unsupported. The corresponding bank statements that would perhaps indicate that the petitioner received this money have not been provided. Finally, as the director specifically requested monetary proof of the claimed qualifying relationship and the information was available but not provided, the appeal will be adjudicated based on the record of



proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988). Consequently, it must be concluded that the petitioner has failed to demonstrate a qualifying relationship with a foreign entity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.